

No. 91-5771

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1991

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HAROLD RAY WADE, JR.,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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MOTION OF AMICUS CURIAE FOR  
LEAVE TO PARTICIPATE IN ORAL ARGUMENT

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Pursuant to Rule 28.7, amicus curiae National Association of Criminal Defense Lawyers moves the Court for leave to participate in oral argument on behalf of petitioner. The grounds for the motion are as follows:

1. This case concerns 18 U.S.C. § 3553(e), which governs the ability of a district court to give a sentence below a statutorily-mandated minimum sentence based on a defendant's "substantial assistance" to the authorities in the investigation or prosecution of another. Section 3553(e) conditions such a lower sentence on a motion being made by the prosecutor.

2. The petition for a writ of certiorari presented a single issue: whether a prosecutor's refusal to make this motion is

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subject to review by the district court.<sup>1/</sup> Petitioner's brief addresses this issue alone. The court below, however, was also presented with the issue of whether the government motion requirement improperly limits the authority of the district court. The court ruled, as it had previously, that the requirement does not violate the Fifth Amendment Due Process Clause or separation of powers principles. See United States v. Wade, 936 F.2d 169, 171 (4th Cir.), cert. granted, 60 U.S.L.W. 3418 (December 9, 1991); United States v. Francois, 889 F.2d 1341, 1344-45 (4th Cir. 1989), cert. denied, 110 S. Ct. 1822 (1990).

3. The reviewability of the prosecutor's refusal is a secondary issue, as recognized by the court below, 936 F.2d at 171, and the other courts of appeals as well.<sup>2/</sup> As a threshold matter, the constitutionality of the government motion requirement must be examined. The brief filed by amicus states the questions presented as follows:

1. Does § 3553(e) violate the Fifth Amendment Due Process Clause because it deprives a defendant of a liberty interest by (a) granting adjudicatory power to the prosecutor; and (b) failing to provide a defendant with an opportunity to be heard by the court?

<sup>1/</sup> The petition framed the issue in terms of § 5K1.1 of the United States Sentencing Guidelines, which has an identical government motion requirement. Amicus believes that § 5K1.1 is not at issue in this case. See Brief of Amicus Curiae at 4-5 n.3. Petitioner agrees that § 3553(e) is the operative provision. See Brief for Petitioner at 10 n.2 (manuscript provided to Clerk for printing).

<sup>2/</sup> E.g., United States v. Levy, 904 F.2d 1026, 1035-36 & n.3 (6th Cir. 1990), cert. denied, 111 S. Ct. 974 (1991) (construing § 5K1.1); United States v. La Guardia, 902 F.2d 1010, 1017 & n.6 (1st Cir. 1990) (§ 3553(e) and § 5K1.1).

2. Does § 3553(e)'s grant of adjudicatory power to the prosecutor violate separation of powers principles?

3. Is a prosecutor's refusal to file a § 3553(e) motion subject to examination by the district court? If so, what is the appropriate standard of review?

The brief filed by amicus fully addresses each issue.

4. Amicus respectfully submits to the Court that both logic and the interests of judicial economy require that the constitutionality of § 3553(e)'s government motion requirement be examined prior to consideration of whether the prosecutor's refusal to make the motion is subject to judicial review. If the requirement is found to violate the Fifth Amendment Due Process Clause or separation of powers principles, the reviewability issue will never be reached. Moreover, whether the government motion requirement satisfies the guarantee of due process is far from settled and is plainly worthy of this Court's consideration:

[T]he difficulty of the issue, the magnitude of the stakes, and the superficiality of the analysis underlying several of the circuits' decisions give reason to hope that the Supreme Court will at some point evaluate [the government motion requirement] in the light shed by its prior teachings on the requirements of due process in the sentencing context.

United States v. Doe, 934 F.2d 353, 363 (D.C. Cir.) (D.H. Ginsburg, J., concurring), cert. denied, 112 S. Ct. 268 (1991) (considering U.S.S.G. § 5K1.1).

5. In light of the importance of the threshold issue of constitutionality, amicus asks that the court (a) allow amicus to

present oral argument on that issue; and (b) grant amicus time for argument in addition to the time already allotted to petitioner.

6. Counsel for petitioner has authorized the undersigned to represent that petitioner consents to this motion.

WHEREFORE, amicus prays that this Court grant the motion for leave to participate in oral argument.

Respectfully submitted,

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The undersigned, a member of the Bar of this Court, hereby certifies that on this 31st day of January, 1992, three copies of Motion of Amicus Curiae for Leave to Participate in Oral Argument were mailed first class, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and J. Matthew Martin, Martin & Martin, P.A., 102 North Churton Street, Hillsborough, North Carolina 27278. All parties required to be served have been served.

Respectfully submitted,

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